

FILED BY CLERK

AUG -8 2007

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:)	2 CA-CV 2007-0016
)	DEPARTMENT A
CAROL M. JONES,)	
)	<u>MEMORANDUM DECISION</u>
Petitioner/Appellee,)	Not for Publication
)	Rule 28, Rules of Civil
and)	Appellate Procedure
)	
JAYSON JONES,)	
)	
Respondent/Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. FC2004-005040

Honorable Larry Grant, Judge

AFFIRMED

The Hallier Law Firm
By Angela K. Hallier

Phoenix
Attorneys for Petitioner/Appellee

Cantor & Simon, PLC
By Stanley David Murray

Tempe
Attorneys for Respondent/Appellant

H O W A R D, Presiding Judge.

¶1 Appellant Jayson Jones appeals from the trial court’s decree dissolving his marriage to appellee Carol Jones, claiming the trial court erred by granting drastic discovery sanctions without holding an evidentiary hearing. As Jayson admits, he failed to raise this issue below. Therefore, he has waived it. *See Banales v. Smith*, 200 Ariz. 419, ¶ 6, 26 P.3d 1190, 1191 (App. 2001).

¶2 Nevertheless, Jayson notes that this rule is procedural and not jurisdictional, citing *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 904 P.2d 861 (1995). In *Jimenez*, the supreme court stated that it would make a “rare exception[]” to the waiver rule and consider issues not raised below if “good reason exists.” *Id.* at 406 n.9, 904 P.2d at 868 n.9. It found good reason in that case because the issues raised were constitutional in nature, affected an entire body of law, and had evaded review. *Id.* Jayson argues the issue in this case affects his due process rights and involves fundamental error. But, here, no such issue of public and statewide interest is involved.

¶3 Jayson relies on two other cases to support his argument. In *State v. Gilfillan*, 196 Ariz. 396, ¶ 17, 998 P.2d 1069, 1074-75 (App. 2000), the court dealt with the constitutionality of a statute. And *Barlage v. Valentine*, 210 Ariz. 270, ¶ 21, 110 P.3d 371, 377 (App. 2005), involved the interpretation of a court rule. Again, Jayson has not shown any similar public good to be served or that any other good cause exists to suspend the rule here. *See id.* n.7 (“courts do not automatically apply” waiver rule, “particularly when interpretation of a statute or rule is at issue”); *see also Dombey v. Phoenix Newspapers*,

Inc., 150 Ariz. 476, 482, 724 P.2d 562, 568 (1986).¹ Accordingly, this case is not one of the “rare exceptions,” *Jimenez*, 183 Ariz. at 406 n.9, 904 P.2d at 868 n.9, in which we will address the waived issue.

¶4 We affirm the trial court’s decree. Jayson has raised an issue on appeal that was admittedly waived, and he does not provide any valid basis for this court to suspend the waiver rule. We determine this position is unreasonable and grant Carol’s request for her reasonable attorney fees incurred on appeal, upon compliance with Rule 21, Ariz. R. Civ. App. P., 17B A.R.S. *See* A.R.S. § 25-324.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge

¹In a footnote in his reply brief, Jayson alleges facts outside the record. We will not consider them. *See GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (“An appellate court’s review is limited to the record before the trial court.”). But we deny Carol’s “Motion to Strike Portion of Appellant’s Reply Brief” and deny Jayson’s request for attorney fees in his Response to that motion.